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8                   UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE  
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10                   BELMAIN PLACE CONDOMINIUM  
OWNERS ASSOCIATION,

11                   Plaintiff,

12                   v.

13                   AMERICAN INSURANCE  
COMPANY,

14                   Defendant.

15                   CASE NO. C19-156 MJP

16                   ORDER ON MOTION FOR  
PARTIAL SUMMARY JUDGMENT

17                   The above-entitled Court, having received and reviewed:

- 18                   1. Plaintiff's Motion for Partial Summary Judgment (Dkt. No. 20),  
19                   2. Defendant's Response to Plaintiff's Motion for Partial Summary Judgment (Dkt. No.  
20                   23),  
21                   3. Plaintiff's Reply in Support of Motion for Partial Summary Judgment (Dkt. No. 25),

22                   all attached declarations and exhibits, and relevant portions of the record, rules as follows:

23                   IT IS ORDERED that the motion is DENIED.

## **Background**

Defendant American Insurance Company insured Plaintiff Belmain Condominium Association's building from 2008 through 2016. There is no dispute that the policy language at issue was the same in all the policies issued by Defendant over this period.

The following provisions of the insurance contract are the subject of the lawsuit. These provisions are contained in endorsements which Defendant attached to the policies, endorsements which changed the lead-in paragraphs to all the exclusions contained in the policies. First is an endorsement entitled "Washington Changes -- Excluded Causes of Loss," which states

[I]n the sections titled Covered Causes of Loss or Exclusions, any introductory paragraph preceding an exclusion or list of exclusions is replaced by the following paragraph, which pertains to application of those exclusions:

We will not pay for loss or damage caused by any of the excluded events described below. Loss or damage will be considered to have been caused by an excluded event if the occurrence of that event:

- a. Directly and solely results in loss or damage; or
  - b. Initiates a sequence of events that results in loss or damage, regardless of the nature of any intermediate or final event in that sequence.

Dkt. No. 21, Decl. of McIsaac, Ex. H. Additionally, the policies state that the defective construction/maintenance exclusion (B.3.c. in the original Causes of Loss provision of the policy) is

1 replaced by exclusion in paragraph C.2. below:

2       C. 2. Exclusions

3           b. Faulty, inadequate or defective:

- 4              (1) Planning, zoning, development, surveying, siting;  
5              (2) Design specifications, workmanship, repair,  
6                          construction, renovation, remodeling, grading  
7                          compacting;  
8              (3) Materials used in repair, construction, renovation or  
9                          remodeling; or  
10             (4) Maintenance;

11                  of part or all of any property on or off the described  
12                  premises. **But if loss or damage by a Covered Cause of  
13                  Loss results, we will pay for that resulting loss or  
14                  damage.**

15       Id. (emphasis supplied). The highlighted section is referred to as an “ensuing loss” provision.

16       Since the policies are “all-risk” policies, any loss or peril which is not specifically excluded is  
17       covered.

18       On February 27, 2018, Plaintiff submitted a claim for coverage based on water intrusion  
19       damage that had been discovered on the property. Id. at Ex. A. The inspector retained by  
20       Defendant concluded that the water intruded on the property due to defects in the original  
21       construction and improper maintenance. Id. at Ex. C.

22       On September 20, 2018, Defendant sent a letter to Plaintiff denying coverage. The letter  
23       contains a list of construction “deficiencies” in the condo building which would permit water  
24       penetration into the structure and concludes that “[a]ny such damage would result from  
inadequate or defective construction and maintenance leading to a sequence of events including  
water, apparently from rain, that penetrated through the exterior cladding which then resulted in  
the damage to the sheathing and framing,” and on that basis found that the damage fell “within

1 the exclusions for faulty, inadequate or defective construction, repairs and maintenance.” *Id.* at  
2 Ex. D.<sup>1</sup>

3 Plaintiff disagreed with Defendant’s interpretation of the policies and pursued its  
4 remedies, in the course of which the Association sent an Insurance Fair Conduct Act (“IFCA”)  
5 notice to its insurer. Defendant responded to that notice on December 18, 2018. The response  
6 noted Plaintiff’s citation to the “ensuing loss provision” and asserted that

7 ... any damage to elements beneath the cladding from water intrusion  
8 would not be covered as an “ensuing loss” to the extent it resulted from  
faulty or inadequate construction, repairs or maintenance.

9 *Id.*, Ex. F. The IFCA response went on to state that “to the extent there is damage to the building  
10 components due to water intrusion, such damage was the result of a ‘sequence of events’ that  
11 were set in motion by the original defects in the construction of the building, together with  
12 subsequent inadequate repairs and maintenance...” *Id.*

13 Plaintiff seeks a ruling that, based on Defendant’s admissions that the water intrusion  
14 damage in the condo building was caused by construction defects/inadequate maintenance that  
15 initiated a sequence of events allowing water to damage the building, Plaintiff is entitled to  
16 coverage under the terms of the policy.

### 17 **Discussion**

18 Plaintiff’s position is fairly simple: “water intrusion/damage” is not mentioned as an  
19 “exclusion” in the all-risk policy, therefore it is a cause of damage which the policy covers, thus  
20 it falls under the “ensuing loss” provision regardless of whether it was initiated by an excluded  
21 form of damage; i.e., construction defects or inadequate maintenance. The Association also

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23  
24<sup>1</sup> It should be noted (as Defendant does) that the letter also included a reservation of rights to assert additional coverage defenses. *Id.*

1 | contends that Defendant has admitted that the water intrusion damage originated with faulty  
2 | construction and poor maintenance and should be bound by that admission.

3 |       Defendant asserts that “[e]nsuing loss provisions are exceptions to policy exclusions and  
4 | should not be interpreted to create coverage.” Wright v. Safeco Ins. Co. of Amer., 124 Wn.App.  
5 | 263, 274 (2004). The insurer argues that its policy is written to create an “inverse efficient  
6 | proximate cause” rule which means that if an excluded event (e.g., defective design or  
7 | workmanship) is the efficient proximate cause of a claimed loss, an ensuing loss provision will  
8 | not preclude denial of coverage. Vision One, LLC v. Phila. Indemn. Ins. Co., 174 Wn.2d 501,  
9 | 519 (2012). Defendant cites the Vision One opinion as upholding the rule that language like  
10 | theirs (defining “cause” as the result of an excluded event which “[i]nitiates a sequence of events  
11 | that results in loss or damage;” Id. at 520) requires an “inverse efficient proximate cause”  
12 | analysis which defeats coverage in this instance (where the “initiating event” in the sequence is  
13 | an excluded event).

14 |       On the surface, the “ensuing loss” provision in Defendant’s policies would appear to  
15 | permit coverage in this situation. While “[f]aulty, inadequate or defective... construction... or  
16 | maintenance” are listed as exclusions in the policies (and Plaintiff is willing to concede that  
17 | defective construction was the “efficient proximate cause” of the water intrusion damage to the  
18 | building; Dkt. No. 25, Reply at 4), the “ensuing loss” provision in the “Exclusions” section states  
19 | that “if loss or damage by a Covered Cause of Loss results, we will pay for that resulting loss or  
20 | damage.” Damage from water intrusion is not a specified inclusion, therefore (the argument  
21 | goes) under the policy it qualifies as a “covered cause of loss.”<sup>2</sup>

22 | \_\_\_\_\_  
23 | <sup>2</sup> This “ensuing loss” language and the efforts to apply it in “all-risk” policies are not without their own problems.  
24 | As the Sixth Circuit has pointed out (in a case not dissimilar to this one)

1        However, Washington case law has carved out a sizeable exception permitting insurance  
2 companies to draft “all-risk” policies which, while including “ensuing loss” provisions,  
3 nevertheless allow them to deny coverage where an excluded event initiates a chain of events  
4 resulting in an arguably covered loss. To understand the evolution of this area of law, it is  
5 necessary to understand, first, the “efficient proximate cause” rule, a rule which  
6              addresses the issue of whether an all-risk insurance policy covers a  
7              loss caused by two or more perils when one of the perils is  
8              excluded and the other peril is covered... “It is the efficient or  
9              predominant cause which sets into motion the chain of events  
producing the loss which is regarded as the proximate cause, not  
necessarily the last act in a chain of events.”

10        Findlay v. United Pacific Ins., 129 Wn.2d 368, 372 (1996)(quoting Graham v. Public Employees  
11        Mut. Ins. Co., 98 Wn. 2d. 538 (1983)).

12        Nevertheless,

13              [t]he efficient proximate cause rule applies only when two or more  
14              perils combine in sequence to cause a loss and a *covered peril* is  
the predominant or efficient cause of the loss... The opposite

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15        [Plaintiff] acknowledges... that faulty workmanship allowed water to seep into the walls.  
16        But the intruding water, it argues, nonetheless amounts to a "peril not otherwise  
17        excluded" because the water caused some of the damage, and water-related damage is not  
otherwise specifically excluded--making it an "ensuing loss" and thus a covered loss.

18        Instead of carving out an exception to this exclusion, this theory of interpretation would  
create a virtual, if not complete, exclusion of the exclusion. When a policy excludes "loss  
19        or damages . . . caused by or resulting from . . . faulty . . . workmanship . . . [or]  
construction" of a building, it should come as no surprise that the botched construction  
20        will permit the elements--water, air, dirt--to enter the structure and inside of the building  
and eventually cause damage to both. [Plaintiff]'s chain of reasoning--that water  
technically was the final causative agent of the damage, as opposed to the faulty  
21        construction, that "water damage" is not specifically excluded from the policy, that  
coverage accordingly applies--essentially undoes the exclusion.

22        TMW Enters. v. Fed. Ins. Co., 619 F.3d 574, 576 (6th Cir. 2010). The opinion goes on to pose hypotheticals in  
23        which faulty construction allows air to enter into an area where it causes damaging rust, or where defective beams  
collapse, and to inquire whether damages caused by “air” and “gravity” are “covered causes of loss” falling under an  
24        “ensuing loss” provision in an all-risk policy.

1 proposition... is not a rule of law. When an *excluded peril* sets in  
2 motion a causal chain that includes covered perils, the efficient  
proximate cause rule does *not* mandate exclusion of the loss.

3 Vision One, 174 Wn.2d at 519 (emphasis in original; citations omitted). Citing Findlay<sup>3</sup>, though,  
4 the Washington Supreme Court indicated that they “have left open the possibility that an insurer  
5 may draft policy language to deny coverage when an excluded peril initiates an unbroken causal  
6 chain.” Id. at 520.

7 Like the policy at issue here, the Vision One all-risk policy defined “cause” (relative to  
8 an excluded event “causing” loss or damage) as

9       when the excluded event “[d]irectly or solely” causes the loss or  
10 damage *or* (2) when the excluded event “[i]nitiates a sequence of  
events that results in loss or damage.”

11 Id. The Washington Supreme Court in Vision One ended up ruling against the insurance  
12 company and in favor of coverage, not because the language of the policy was inadequate to  
13 establish the exclusion, but because in its denial letter the insurance company relied exclusively  
14 on the first causation prong (“directly or solely” caused) and not on the second (“initiates a  
15 sequence of events”) prong. Further, the denial letter identified the “direct and sole” cause of the  
16 damage as “faulty workmanship,” which, although it was an “excluded peril” under the policy,  
17 contained an “ensuing loss” provision. “Coverage must be determined under the policy language  
18 [Defendant] relied upon when it denied coverage... A provision must be asserted as a basis for  
19 denying coverage,” said the Vision One court (id.), and the insurer was stuck with the basis for  
20 denial which it had articulated, a basis which provided inadequate grounds for exclusion.

21       In what amounts to *dicta*, though, the court stated:

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23       <sup>3</sup> “We did not forbid the use of clear policy language to exclude a specifically named peril from coverage.” 129  
24 Wn.2d at 376.

[T]his second prong (i.e., when the excluded event “initiates a sequence of events that results in loss or damage”) *may* permit the sort of inverse efficient proximate cause analysis we allowed for in Findlay.

Id. at 521 (emphasis supplied).

In its briefing on this motion, Plaintiff (1) concedes, not only that faulty construction was the efficient proximate cause of the damage, but that their policy “contains valid inverse proximate cause rule language and that defective construction/maintenance did, in fact set into motion a sequence of events sufficient to trigger that inverse proximate cause language” (Reply at 5) and (2) fails to address the impact of Vision One, an omission which leaves Defendant’s argument that Vision One dictates the outcome of this motion unchallenged.

Plaintiff relies instead on a ruling by the Honorable Barbara J. Rothstein of this district from several years ago which found liability for water intrusion damage despite a “faulty construction” exclusion. Greenlake Condominium Assoc’n v. Allstate Ins Co., C14-1860 BJR, 2015 WL 11988945 (W.D. Wash. Dec. 23, 2015). But Greenlake Condo is distinguishable from these facts – the policy language there only excluded coverage for damage “caused by” faulty construction, not for damage which had occurred in a “sequence of events initiated by” an excluded peril. Id. at \*10. Judge Rothstein rejected the insurance company’s argument that denial was justified on the basis of this clause, stating “Simply excluding damage ‘caused by’ a peril is a far cry from the explicit [inverse efficient proximate cause] language provided as an example by the Vision One court.” Id. Greenlake Condo does not further Plaintiff’s cause.

### **Conclusion**

The Court denies Plaintiff's motion on two grounds. First, the *dicta* cited above from Vision One points most definitely to the result sought by Defendant; namely, a finding that an insurance company can legitimately seek protection from an "ensuing loss" provision in the

1 circumstance where an excluded peril sets in motion a chain of events leading to a loss from a  
2 covered peril. The Court finds it significant that Defendant here did everything that the  
3 insurance company in Vision One failed to do; namely, relied on the “initiates a sequence of  
4 events” causation prong and did so repeatedly in its denial letters. As a federal court applying  
5 state law, it is the role of this Court to predict what the Washington Supreme Court would do in  
6 these circumstances, and Vision One dictates a prediction that Washington law favors  
7 Defendant’s position regarding coverage under these facts.

8 Second, this Court cannot help but subscribe to the TMW court’s opinion that Plaintiff’s  
9 “theory of interpretation would create a virtual, if not complete, exclusion of the exclusion.”  
10 Plaintiff’s position has the potential to swallow the exclusions in an all-risk policy whole. The  
11 Vision One position is the more equitable and, by the Court’s reading of these contracts, more  
12 representative of the parties’ intentions.

13 Plaintiff’s request for partial summary judgment in favor of coverage under its policies  
14 with Defendant is DENIED.

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16 The clerk is ordered to provide copies of this order to all counsel.

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Dated September 4, 2019.



18  
19 Marsha J. Pechman  
20 United States Senior District Judge  
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